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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 111

GUSTANES ANCKER, ROYAL W. ARMSTRONG, FRED M. BARTLETT, ET AL.,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Gustanes Ancker, Royal W. Armstrong, Fred M. Bartlett, William E. Bloom, Jack Brooks, Alvin C. Burke, Harold Curry, Nancy Curry, Lester Steve Czanik, Henry A. Davidson, George Allen DeWitt, David Fisher, Bernard Flyman, Martin E. Fortson, Emil Freed, John Gibson, James Grace, Ernest Grant, Lester S. Greenberg, Fred Hainline, Edwin Hale, John Hansen, Charles Hart-

man, Stanley Hasrato, Edward M. Havens, Orvin Johnson, Thomas Jones, Stanley Joslin, James Kane, Sam Kowal, Walter Kelly, Sheldon Kelsey, Rudolph Kern, Dan Elby, and Henry Klette, pray that a writ of certiorari issue to review a decision and judgments of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, rendered on December 29, 1947 (R. 107-119, 125-126), which affirmed in part certain judgments and orders of the Municipal Court of the City of Los Angeles under which petitioners stand severally convicted of a misdemeanor (R. 973-979) for violating Section 166(4) of the Penal Code of the State of California (Deering, Penal Code of California, 1937, p. 56). Petition for Rehearing was denied on January 22, 1948 (R. 125).

Opinion Below

The opinion of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, has not yet been officially reported. It appears in the record at R. 107-120.

Statement of Matter Involved

The 35 petitioners, together with 90 others, were charged in a single complaint containing 4 separate counts charging misdemeanors, all based on the picketing by petitioners of the studios of the Columbia Pictures Corporation in Los Angeles on the morning of November 16, 1946 (R. 1-10).

The petitioners and 6 others were tried en masse. They were convicted of violating Count I and II of the complaint (R. 973-979). The Appellate Department of the Superior Court reversed the convictions on Count I and allowed the convictions under Count II to stand. The petitioners seek review herein of said convictions under Count II of the complaint.

Count II of the complaint charged the petitioners with the commission of a misdemeanor, a violation of Section 166(4) of the Penal Code of the State of California in that the petitioners "did wilfully and unlawfully and knowingly —at a place of business of the Columbia Pictures Corporation—disobey a lawful order * of the Superior Court of the State of California in and for the County of Los Angeles"—in that each of them—"disobeyed certain provisions" of an *ex parte* restraining order issued out of that court (R. 4-6).

Count II of the complaint contained *verbatim* 5 paragraphs or sections of the restraining order (Paragraphs 1, 2, 4, 5, 11). Paragraphs 1, 2 and 4 were sweeping in scope and enjoined conduct in such familiar and constitutionally prohibited terms as "intimidating," "threatening," "molesting," "coercing" and "obstructing." Paragraphs 5 and 11 arbitrarily purported to limit the number of pickets around and in the vicinity of the plaintiff's place of business in terms which were conflicting and physically impossible to comply with.

The restraining order alleged to have been disobeyed by the petitioners was contained in a 10-line paragraph attached to an order to show cause of 6 typewritten pages which contained 11 numbered paragraphs of restraints which were prayed for, several being prayed for in the alternative. The restraining order did not set forth the restraining provisions in *haec verbae* but incorporated them merely by referring by number to certain paragraphs of the order to show cause (See Appendix p. 29).

Each paragraph of the restraining order alleged to have been violated by the petitioners contained disjunctive provisions. The complaint upon which petitioners were con-

* The restraining order and the order to show cause of which it was a part are set forth in the Appendix to this Petition (p. 22).

victed charged the violations of certain sections of the restraining order in similar disjunctive fashion, thus, in effect, charging each petitioner with criminal conduct described in a series of alternatives. The complaint was wholly silent as to any *acts* committed by any of the petitioners upon which the alleged violations of the several paragraphs of the restraining order were predicated.

When the case was called for trial, February 4, 1947, counsel for the then 125 defendants, including all of the petitioners, moved for an order severing the then 125 defendants into groups small enough to guarantee to the defendants all the elements of a fair trial under the State and United States Constitutions (R. 129-131).

In response to that motion the court selected and severed the trial of the 35 petitioners, together with six other persons (whose cases never reached the jury) and ordered a trial as to these 41 defendants, over objection of defendants' counsel (R. 131).

On the next court day, February 6, 1947, and under the then existing physical circumstances (R. 92), and with knowledge of the number of defendants assigned for joint trial, counsel for petitioners undertook to make a motion for further severance. The court refused to entertain such motion, to hear evidence thereon, or to permit counsel for petitioners to make an offer of proof in support thereof (R. 134-135).

On denial of the aforesaid motion, the Municipal Court proceeded to trial on said February 6, 1946, against the 35 petitioners herein, together with six other persons and after verdict by the jury the trial court imposed the sentences and orders ranging from one year in jail to two years summary probation, to which was added fines aggregating $9650.00 (R. 975-979).

The temporary restraining order involved herein was issued *ex parte* on the 9th day of October, 1946 (People's Exhibit L, R. 211-213, set forth in appendix), and by three successive minute orders was continued in effect until the 19th day of November, 1946 (People's Exhibit N, R. 270-271). There was no evidence before the Trial Court whatsoever as to what, if any, facts were presented to the issuing court. Neither the complaint nor supporting affidavits were introduced, and the order itself fails to recite any jurisdictional facts whatsoever. The orders of continuance recited no facts nor was any evidence introduced to show their justification.

As to 25 of your petitioners, who did not take the stand, the record discloses that whatever knowledge they had, concerning the contents of the order, was communicated to them by a single broadcast (R. 248, 282), under noisy conditions (R. 255-257), over a loud-speaker system (R. 211-213) to the picket line, of which they were members, by an unseen police officer reading it, word for word, as it appears in People's Exhibit L, including all of the John Does and all of the prohibitory paragraphs, including paragraphs 8, 9 and 10, which were not granted by the court, and paragraphs 3, 6 and 7, with the violations of which petitioners were not charged (R. 277, 282). This broadcast was of 17 minutes duration (R. 219).

The trial court, in respect to Count II, instructed the jury that it should convict petitioners if it found that they had violated any one or more of the five paragraphs of the order as charged in the complaint, or any part thereof (R. 40-41).

Each of the 35 verdicts of the jury finding Petitioners severally guilty of Count II was general (R. 973).

Statement as to Jurisdiction

The final judgment of the Appellate Department was entered December 29, 1947 (R. 107-119, 125-126); and petition for rehearing was denied on January 22, 1948 (R. 125). On April 13, 1948, Mr. Justice Douglas signed an order extending the time for filing a petition for a writ of certiorari in the above entitled cause to and including June 21, 1948 (R. 983). The Appellate Department is the highest court in the state of California to which petitioners under the California law might appeal their case. California Constitution, Art. VI, Secs. 4, 4b and 5; *Edwards* v. *California*, 314 U. S. 160; *Carlson* v. *California*, 310 U. S. 106; *Portnoy* v. *Superior Ct.*, 20 Cal. (2) 375, 125 P. (2) 487. The jurisdiction of this Court is invoked under Sec. 237b of the Judicial Code, as amended (28 U. S. C. 344 (b)).

In the proceedings below the petitioners specially set up and claimed that their conviction under Count II of the complaint infringed upon their rights and privileges under the Constitution of the United States and particularly under the First and Fourteenth Amendments thereof.

The Federal questions sought to be reviewed by the petitioners were raised and considered in the Courts of California as follows:

A. The denial of free speech and assembly by undue restraints on picketing contained in the restraining order, upon which Count II of the complaint was predicated, was raised as a violation of the petitioner's rights under the First and Fourteeth Amendments, in the first instance by demurrer (R. 10, 12-13) which was overruled (R. 930); in the Statement on Appeal, Grounds #'s (8), (24), (25), (R. 96, 100-101); and in the Petition for Rehearing (R. 120-124). The Appellate Department of the Superior Court considered petitioners' claim of unconstitutionality (R. 113-115), held Paragraph 11 of the restraining order valid but deemed it

unnecessary to pass upon the remaining paragraphs of the restraining order (R. 113-114). The Appellate Department found that the record was bare of any showing that "proper circumstances existed" for the restraints on picketing and held that "in the absence of any evidence to the contrary" there was a presumption that a "factual foundation" for the order existed (R. 114). The Appellate Department recognized however, in considering Count I, that picketing was "constitutionally protected as a legitimate means of conveying ideas" and that it "may not be forbidden on the ground that, incidentally, it blocks and hinders those who would enter the place picketed" (R. 111), thus recognizing the complete constitutional invalidity of Paragraph 4 of the restraining order (contained in Count II) which restrained "obstruction" merely (See Appendix p. 26), but refusing at the same time to pass upon the same (R. 113-114).

B. The vagueness of the restraining order and of Count II of the complaint, which was predicated thereon as being repugnant to the due process clause of the Fourteenth Amendment, was raised in the first instance by demurrer (R. 12-13) which was overruled (R. 930); and in the Statement on Appeal, Grounds (1) and (26) (R. 95, 101). The Appellate Department of the Superior Court did not pass directly on this claim but found, however, that the provisions of the restraining order contained in Count II of the complaint were "varied and in part conflicting", that the defendants and police officers who testified were "vague as to the details of the order"; that "little imagination was used in its drafting to make it readily grasped when broadcast" (R. 117).

C. Petitioners claimed as a violation of due process under the Fourteenth Amendment that the jury, instructed by the court that a verdict of guilty could be rendered if peti-

tioners were found to have violated *any one* of the paragraphs of the restraining order, did return a general verdict of guilty upon that count which contained one or more of the provisions of the restraining order which were unconstitutional because of vagueness and undue restrictions on picketing (Petition for Rehearing, Paragraph A, R. 120-122). The Appellate Department inferentially had ruled adversely on this claim by the holding in its memorandum opinion that the legal sufficiency of *one* of the paragraphs of the restraining order set forth in Count II of the complaint was adequate to justify the general verdict of guilty returned on that count (R. 113-114), and ruled directly on that point by its denial of the petition for rehearing (R. 125).

D. After the trial court had severed the trial of the 125 defendants named in the complaint, leaving 41 defendants including all of the petitioners to be jointly tried (R. 131), petitioners attempted to make a further motion for severance but their counsel was not allowed to proceed with his motion, nor to state his grounds therefor, nor to lay a factual foundation to support it (R. 133-135). The constitutional claim of lack of due process was specifically made, however, in the Statement of Appeal (R. 91-92) and in the Grounds of Appeal (R. 96) and in the Petition for Rehearing (R. 124). The Appellate Department in its memorandum opinion considered this claim but held that the prior motion to sever which resulted in the first severance precluded any further motion on that subject, holding that, though petitioners were "inconvenienced" (R. 109), "none were legally prejudiced by the compromise that had to be made between the State's interest and that of the defendants" (id.); no error was found by the Appellate Department in the refusal to receive evidence or an offer of proof in support of the claim of invasion of constitutional right which counsel sought to advance then and later did.

Statute and Restraining Order Involved

1. Section 166(4) of the Penal Code of the State of California (Deering, Penal Code of California, 1937, p. 56):

> Section 166. *Criminal Contempts.* Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:
>
> * * * * * * *
>
> 4. Wilful disobedience of any process or order lawfully issued by any court;

2. The restraining order of the Superior Court of the State of California in and for the County of Los Angeles appears in the Order to Show Cause set forth in the Appendix to this petition (p. 29).

Questions Presented

1. Were petitioners denied freedom of speech and assembly guaranteed by the Fourteenth Amendment by the undue restraints on picketing contained in a restraining order issued *ex parte* upon which Count II of the complaint was predicated and under which they were convicted of a misdemeanor?

2. Were the defendants deprived of due process of law under the Fourteenth Amendment by conviction on a complaint charging as a misdemeanor the violation of a restraining order restricting picketing in a trial in which no evidence of any acts constitutionally justifying such restraint was offered in behalf of the People?

3. Were the petitioners denied due process of law in violation of the Fourteenth Amendment by their conviction on a complaint, vague in itself and containing charges in the disjunctive and no allegation of any acts committed by the petitioners, and which was predicated on a restraining

order too vague, ambiguous and uncertain to inform petitioners of the nature of the accusation against them and to protect them against double jeopardy?

4. Where one or more of the paragraphs of an *ex parte* restraining order were void because they imposed unconstitutional restrictions upon picketing and where the verdict of guilty was general after an instruction that the jury should convict if they found petitioners had violated any one provision of any one paragraph of the restraining order, were petitioners denied due process of law as guaranteed by the Fourteenth Amendment under the doctrine of *Stromberg* v. *California* (1931) 283 U. S. 359?

5. Were petitioners denied due process of law in violation of the Fourteenth Amendment to the United States Constitution when over objection they were compelled to stand trial *en masse* in a group of 41 defendants on a misdemeanor complaint containing 4 separate and distinct counts against each defendant, the second count containing five separate specifications of criminal conduct divided in turn into numerous provisions pleaded in the disjunctive (all aggregating hundreds of separate charges) which were tried and considered by a jury over a period of 2 months and which resulted in 140 separate verdicts?

6. Were petitioners denied due process in violation of the Fourteenth Amendment by the refusal of the trial court to hear a motion for further severance and to accept evidence or a proffer of proof or facts proffered to establish the constitutional right to such severance?

Reasons Relied On for Allowance of the Writ

This case arises out of a labor dispute in the motion picture industry which involved thousands of persons. Not only petitioners, but hundreds of other persons were ar-

rested and tried on charges similar to those which are the subject of this petition. The combined use of sweeping *ex parte* injunctions and of the Penal Law of California in vague complaints (alleging no facts) tried out in mass trials with consequent disregard of constitutional safeguards and under oppressive burdens of trial and appeal by defendants, tends to re-establish as a pattern for the resolution of industrial disputes the coercive methods which were prevalent in the years before 1932. It is of the greatest importance that the fundamental rights guaranteed by the Fourteenth Amendment be reasserted in this case in accord with the applicable decisions of this Court to the end that there be no abridgement by excessive and over-zealous use of state power, of the exercise of individual and collective expression and action in labor disputes in the area which this Court time and again has ruled to be within the protection of the Fourteenth Amendment.

I

A. The decision of the Appellate Department of the Superior Court refusing to consider the claim of unconstitutionality of paragraphs 1, 2, 4 and 5 of the restraining order contained in Count II of the complaint upon which petitioners were convicted, at least one of said paragraphs being void on its face for vagueness and for limitations on the exercise of speech, assembly and peaceful picketing by petitioners, is not in accord with the applicable decisions of this Court.

Paragraphs 1 and 2 of the restraining order enjoined all picketing which had as its purpose "intimidating", "threatening", "molesting" or "coercing" of various categories of persons in relations with plaintiff company and all who sought entrance to plaintiff's places of business. That this type of language includes in its ambit picketing which is peaceful and which may not be constitutionally enjoined

is recognized by the State of California. "It is too firmly established to merit much more than the mere enumeration of the fact that not all conduct embracing or effecting compulsion, coercion, intimidation, threats and menace is unlawful"—*In re Porterfield* (1946) 28 Cal. (2d) 91, 168 P. (2d) 706.

Paragraph 4 of the restraining order in effect prohibits picketing by enjoining the "obstruction • • • from ingress or egress into and out of plaintiff's places of business by walking, marching or standing in groups or in any other manner"—no matter how peaceful the intent and how incidental the obstruction.

The Appellate Department in its decision in this case declared the law of the State of California to be that the constitutional protection of picketing is not forfeited merely because such picketing "incidentally • • • blocks and hinders those who would enter the place being picketed"• (R. 111). Thus it has been authoritatively held by the State of California that the term "obstruction" includes in its scope constitutionally protected action as well as action which might be subject to penal sanctions.

Paragraph 5 of the restraining order enjoined "standing, marching or walking in groups or columns" before the entrances of the plaintiff's places of business in such manner as to leave not less than 25 feet of space "between adjacent elements of such groups or columns" before vehicular entrances and 15 feet before entrances used solely for pedestrian traffic. Paragraph 11, however, seemingly permits as many as 8 pickets in front of vehicular entrances and as many as 4 pickets in front of pedestrian entrances. Obvioulsy, to station the number of pickets permitted by paragraph 11 either at vehicular or pedestrian entrances would

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•Citing: *In re Blaney* (1947), 30 A. C. 648, 652; *Pezold* v. *Amalgamated, etc., Workmen* (1942), 54 Cal. App. (2d) 120, 126.

violate the provisions as to distances between pickets required by paragraph 5, and certainly, would lead to the "obstruction", albeit unintentional, prohibited by paragraph 4 of the restraining order.

The Appellate Department recognized the vagueness and uncertainty inherent in those restraining paragraphs by finding that the provisions thereof were "conflicting and varied" and that petitioners as well as police officers who testified quite understandably were "vague as to the details of the order", • • • "for little imagination was used in its drafting to make it readily grasped when broadcast" (R. 117). The Appellate Department failed, however, to draw the conclusion required by the Fourteenth Amendment that the paragraphs of the restraining order were void and that their use as a basis for a criminal proceeding violated due process.

The restraining paragraphs are drawn in the tradition of the sweeping injunctions of another era and stand condemned by this Court in *Thornhill* v. *Alabama* (1939), 310 U. S. 88; and in the picketing cases which followed; *Milkwagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, (1941), 321 U. S. 287; *AFL* v. *Swing* (1941), 312 U. S. 312; *Carlson* v. *California* (1939), 310 U. S. 106.

The restraining order is not "narrowly drawn" to cope with specific evils of which there may have been imminent danger; *Thornhill* v. *Alabama, supra;* Cf. *Saia* v. *New York,* — U. S. —, 68 S. Ct. Ref. 1148. Nor does it define the limitations upon "normally free conduct" in the "clear and guarded language" held by this Court to be appropriate in "the exceptional cases warranting restraint" of picketing; *Milkwagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra.* This case, therefore, calls for the application of the well-established rule recently reiterated by this Court that it will readily strike down language as ambiguous and uncertain when the puni-

tive action it evokes is "entwined with limitation on free expression"; *Winters* v. *New York* (1948), 333 U. S. 507; *Stromberg* v. *California, supra; Herndon* v. *Lowry* (1937), 301 U. S. 242, 258; *Thomas* v. *Collins* (1945), 323 U. S. 516.

Aside from the unconstitutional limitation on speech contained in the broad and uncertain language of the several paragraphs of the restraining order, these paragraphs embedded in Count II of the complaint as the criteria of criminal guilt set up no ascertainable standards of prohibited conduct, thus violating the due process guarantees of the Fourteenth Amendment; *Thornhill* v. *Alabama, supra; Lanzetta* v. *New Jersey* (1939), 306 U. S. 451, 453; *Connally* v. *General Construction Co.,* (1926), 269 U. S. 385; *United States* v. *Cohen Grocery Co.,* (1921), 255 U. S. 81; *M. Kraus & Bros.* v. *United States* (1946), 327 U. S. 614; *Winters* v. *New York, supra.* The constitutional vice of vagueness which necessarily taints the complaint as well as the provisions of the restraining order is enhanced in the complaint itself by the fact that no *act* committed by any of the 41 defendants is set forth to indicate which of the multiple provisions of the restraining paragraphs were violated and in what manner; *United States* v. *Cruikshank* (1876), 23 L. Ed. 588; *Evans* v. *United States,* 153 U. S. 584; *United States* v. *Hess,* 124 U. S. 483; *United States* v. *Carll,* 105 U. S. 611; *Cole* v. *Arkansas,* 333 *U. S.* 196; and by the further fact that many of the provisions of each paragraph of the restraining order are pleaded in the disjunctive; *for example,* each petitioner is charged with obstructing (without any particularity) employees, customers *or* tenants *or* other persons (without naming or describing them) from ingress and egress into and out of plaintiff's *places* of business (without naming which place, or at which of the numerous entrances described in paragraph 11 of the restraining order, the "obstruction" took place) by walking, marching *or* standing in groups *or in any other manner* (without any

specification whatever). Such pleading in a criminal case gives no notice of the nature of the accusation, gives no opportunity to prepare a defense, and gives no protection against double jeopardy—thus violating due process; *United States* v. *Clarke,* 20 Wall. 92, 87 U. S. 92.

The vagueness which permeated the restraining order and complaint was further enhanced by the vagueness in understanding of the terms of the restraining order found by the Appellate Department to have existed among petitioners (R. 117). This vagueness of understanding necessarily flowed from the method of communicating the restraining order by reading it over a loudspeaker in the vicinity of the picket line as a ten-line appendage of an order to show cause six pages in length, and referring to the restraints merely by paragraph number as they had been numbered in the order to show cause which had previously been blared out of the loudspeaker.

B. The Appellate Department of the Superior Court in holding that paragraph 11 of the restraining order limiting the number of pickets was constitutionally valid, in the absence of any showing of facts justifying such restraint in the record, decided a question not heretofore decided by this Court and probably not in accord with applicable decisions of this Court.

The restraining order was issued *ex parte* as part of an order to show cause. Neither the order to show cause nor the restraining order itself alleged any facts in justification of the arbitrary limitation of pickets at various places of ingress and egress and on the highway near the plaintiff's places of business, to numbers ranging from two to twenty-five. Nor did the People offer as evidence the complaint and supporting affidavits, if any, on which the Superior Court of Los Angeles County had acted in issuing the *ex parte* restraining order, although section 166(4) of the California

Penal Code requires as an element of the offense that the order disobeyed must be a "lawfully issued" one. (The absence of this evidence was described by the Appellate Department as due to "some queer quirk"—R. 114-115.)

The Appellate Department in its opinion adverted to the doctrine of the *Meadowmoor case, supra,* as allowing limitation of pickets under certain circumstances. It found, too, that there was no proof in the record that such "proper circumstances existed" (R. 114). But that Court avoided its plain duty to reverse the convictions both under the requirements of section 166(4) and under the *Meadowmoor* doctrine by adopting the presumption "that there was a factual foundation for the order" (id.). The use of a presumption of factual basis, particularly in connection with an *ex parte* restraint used as a basis for a criminal prosecution, is a frustration of the *Meadowmoor* doctrine and makes possible the very type of restraint which the *Meadowmoor* doctrine intended to prohibit. The *Meadowmoor* doctrine, as applied by the Appellate Department precludes the "search of the record" by a reviewing state court or by this Court for the factual basis required under that doctrine to justify picketing restraints. The decision of the Appellate Department paves the way for restraints based on "insubstantial findings of fact screening reality", or based on no findings of fact whatsoever. Lack of due process further is manifest in the use of the presumption in that it obviated the necessity of proof of an essential element of the offense and thus deprived petitioners of the presumption of innocence.*

* The ruling in the case of *United States* v. *United Mine Workers of America,* 330 U. S. 258, to the effect that an injunction must be obeyed until reversed, however erroneous it may be, has no applicability in this case for the following reasons: The petitioners were not tried for contempt of court; they were tried on a criminal charge founded on a section of the Penal Code of California; the misdemeanor defined in Section

II

The refusal of the Appellate Department of the Superior Court to pass upon the constitutional validity of paragraphs 1, 2, 4 and 5 of the restraining order set forth in Count II of the complaint, upon which petitioners were severally found guilty in general verdicts, is not in accord with the applicable decisions of this Court in view of the constitutional invalidity of one or more of said paragraphs for vagueness and restraints which encroach upon conduct protected by the Fourteenth Amendment. Under "I" hereof it has been established that paragraphs 1, 2, and 4 of the restraining order each in themselves were unconstitutional for vagueness and excessive limitation on picketing, that paragraphs 5 and 11 were unconstitutional for the arbitrary limitation on picketing and that all paragraphs taken together were unconstitutional for vagueness and uncertainty because of conflicting provisions.

Assuming *arguendo* that paragraph 11 was valid as the Appellate Department of the Superior Court found, the general verdicts returned by the jury violate due process of law. The trial court charged the jury that a petitioner could be found guilty if there was disobedience "of any one" of the paragraphs of the restraining order or of "a provision of any one of the paragraphs" (R. 40-41).

On the assumption that the verdicts of guilty would stand if only one paragraph of the restraining order was valid, the Court held paragraph 11 to be so, deeming it unnecessary "to determine whether or not any other provisions were enforceable".

166(4) has as one of its elements the requirement that the disobeyed order be "lawfully issued," thus placing directly in issue the validity of the restraining order; under the law of California a constitutionally invalid injunction may be violated with impunity; *Fortenbury* v. *Supreme Court* (1940) 16 Cal. (2d) 405, 106 P. (2d) 411.

This assumption by the Court is directly *contra* to the holding of the *Stromberg* case, *supra,* in which the conviction was reversed because at least *one* of several counts of an indictment was void under the Fourteenth Amendment. Here, each of the paragraphs taken individually and together are void. The lack of due process is manifest; *Williams* v. *North Carolina* (1942), 317 U. S. 287.

III

A. The petition seeks review of the special and important question of the extent of the limitations required by the due process clause of the Fourteenth Amendment on mass criminal trials in state courts—a question over which this Court has expressed grave concern; *Kotteakos* v. *United States* (1945), 328 U. S. 750. The Appellate Department of the Superior Court of California in upholding the refusal of the trial court to sever trial of petitioners in the face of constitutional objections decided a phase of this question not heretofore decided by this Court and probably not in accord with the applicable principles of the *Kotteakos* case, *supra.* In that case, this Court recognized that conditions created by a mass trial constituted lack of due process. Thirty-two defendants on eight charges of conspiracy were involved. Nineteen went to trial and the jury finally considered the guilt of only 13. This Court recognized that neither convenience nor efficiency in prosecution are reasons per se justifying mass trials—and that such trials are inherently dangerous to individual rights. Cf. *United States* v. *Central Supply Association* (E.D. Ohio, 1947), 6 F.R.D. 526.

In the present case the complaint was not founded on conspiracy, but each defendant was charged and severally tried, though in mass, witness the 140 separate verdicts (R. 973-979).

Under the Court's charge, *supra*, the jury in this case had to consider separately as to each defendant not only Counts I, III and IV, and the 5 paragraphs of Count II, but also the numerous separate provisions of each of said paragraphs. Without considering these separate provisions each defendant was charged 8 times. If the separate provisions are considered each defendant was charged no less than 20 times. The jury therefore would have had no inconsiderable difficulty in determining the guilt of *one* defendant on the complaint before it. But the jury was actually obliged to consider the guilt or innocence of 41 defendants on a total of not less than 328 specific charges considering the Counts of the complaints and paragraphs of the restraining order alone, and possibly more than 820 charges of separate offenses if the separate provisions of the restraining order are also considered.

Each of the petitioners instead of facing a trial of one or two days at most, was obliged to attend court over a two months' period in which numerous witnesses took the stand, numerous exhibits were introduced and approximately 1500 pages of testimony were taken. This mass trial by its very nature and extent deprived the petitioners of due process in violation of the Fourteenth Amendment. True, the Appellate Department found that the petitioners "were inconvenienced". But inconvenience aside, whether it be financial, the burden of appeal, or the time lost in court, the mass trial denied due process. It was impossible to escape the inherent difficulty of effective consultation with counsel. It was impossible for the court to "scrupulously safeguard each defendant individually . . . from loss of identity in the mass" (*Kotteakos* case, *supra*, 776). It was impossible to avoid guilt by association. The conclusion is unavoidable that as a matter of law the jury could not possibly have given such consideration to all of the

petitioners on each of the charges and as to all of the evidence as to each petitioner as is required to establish guilt beyond a reasonable doubt.

As this Court pointed out in the *Kotteakos* case, the "possibility for miscarriage of justice becomes greater and greater" as the number of defendants and number of charges increase. Here the limits allowed by due process were clearly exceeded.

The Appellate Department upheld the Trial Court's ruling that a previous severance of defendants under the complaint here under consideration, which reduced the number of defendants from 125 to 41, precluded a further motion for additional severance. Counsel for the petitioners attempted to make such motion but was stopped by the court (R. 134-135). The fact is that after the severance had reduced the defendants to 41, the petitioners continued their objection to a mass trial and sought to reduce the number still lower. Over their objection, they were compelled to proceed.

B. The Trial Court refused to receive testimony or an offer of proof on the facts which counsel desired to elicit to support the constitutional basis for the second motion for severance. Thus petitioners were deprived of establishing the factual basis upon which they would have been predicated, their claim advanced on appeal that the mass trial would have deprived them of the *effective* use of counsel and of an *effective* jury trial. This refusal to hear facts to support a constitutional objection was in itself a lack of due process; Cf. *Snowden* v. *Hughes* (1944), 321 U. S. 1, 8-9; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548.

Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM J. ISSERMAN,
133 West 44th Street,
New York, New York;
SAM HOUSTON ALLEN,
6513 Hollywood Blvd.,
Hollywood, California;
FRANK PESTANA,
1505 North Western Ave.,
Los Angeles 27, Calif.;
WILLIAM ESTERMAN,
1505 North Western Ave.,
Los Angeles 27, Calif.;
WILLIAM B. MURRISH,
1505 North Western Ave.,
Los Angeles 27, Calif.;
STANLEY FLEISHMAN,
1505 North Western Ave.,
Los Angeles 27, Calif.,
Counsel for Petitioners.

APPENDIX

Order to Show Cause and Restraining Order Upon Which Count II of the Complaint Was Based

In the Superior Court of the State of California in and for the County of Los Angeles.

Columbia Pictures Corporation, a corporation, Plaintiff, v. Local No. 946 of the United Brotherhood of Carpenters and Joiners of America, an unincorporated voluntary association; Jim Skelton, individually and as business agent of said last named association; Roe One and Roe Two, individually and as President and Secretary respectively of said last named association; Doe One to Doe Two Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated) individually and (each of them) as members of said last named association; Painters Local No. 644 of the International Brotherhood of Painters, Decorators and Paperhangers of America, an unincorporated voluntary association; Herbert K. Sorrell, individually and as business agent of said last named association; Roe Three and Roe Four, individually and as President and Secretary respectively of said last named association; Doe Two Hundred and Fifty-one to Five Hundred (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Cinema Lodge No. 1185 of the International Association of Machinists, an unincorporated voluntary association; J. R. Stehr, individually and as business agent of said last named association; Roe Five and Roe Six, individually and as President and Secretary respectively of said last named association; Doe Five Hundred and One to Seven Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated) individually and (each of them) as members of said last named association; Local No. 40 of the International Brotherhood of Electrical Workers, an unincorporated voluntary association; Roy Tyndall, individually and as business agent of said last named association; Roe Seven and Roe Eight,

individually and as President and Secretary respectively of said last named association; Doe Seven Hundred and Fifty One to One Thousand (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Local No. 278 of the Building Service Employees International Union, an unincorporated voluntary association; Jack Williams, individually and as business agent of said last named association; Roe Nine and Roe Ten, individually and as President and Secretary respectively of said last named association; Doe One Thousand and One to One Thousand Two Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Screen Set Designers, Illustrators & Decorators Local No. 1421, Affiliated With the International Brotherhood of Painters, Decorators and Paperhangers of America, an unincorporated voluntary association; Edward Gilbert, individually and as business agent of said last named association; Roe Eleven and Roe Twelve, individually and as President and Secretary respectively of said last named association; Doe One Thousand Two Hundred Fifty One to One Thousand Five Hundred (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Screen Cartoonists Guild, Local No. 852, an unincorporated voluntary association; Morris Howard, individually and as business agent of said last named association; Roe Thirteen and Roe Fourteen, individually and as President and Secretary respectively of said last named association; Doe One Thousand Five Hundred and One to Doe One Thousand Seven Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Conference of Studio Unions, an unincorporated voluntary association; Herbert K. Sorrell, individually and as President of said last named association; Black Union One to Black Union Twenty (inclusive as to all intervening numbers as

though each said Black Union was severally and separately designated), each an unincorporated voluntary association; Mark One to Mark Twenty (inclusive as to all intervening numbers as though each said Mark was severally and separately designated), individually and as the respective business agents of said last named associations; Roe Nineteen to Roe Thirty-eight (inclusive as to all intervening numbers as though each said Roe was severally and separately designated), individually and as the respective Presidents of said last named associations; Roe Thirty-nine to Roe Forty-eight (inclusive as to all intervening numbers as though each said Roe was severally and separately designated), individually and as the respective Secretaries of said last named associations; Doe Two Thousand Two Hundred and Fifty-one to Doe Two Thousand Five Hundred; Doe Two Thousand Five Hundred and One to Doe Two Thousand Seven Hundred and Fifty; Doe Two Thousand Seven Hundred Fifty One to Doe Three Thousand; Doe Three Thousand and One to Doe Three Thousand Two Hundred and Fifty; Doe Three Thousand Two Hundred Fifty-one to Doe Three Thousand Five Hundred; Doe Three Thousand Five Hundred and One to Doe Three Thousand Seven Hundred and Fifty; Doe Three Thousand Seven Hundred Fifty-one to Doe Four Thousand; Doe Four Thousand and One to Doe Four Thousand Two Hundred and Fifty; Doe Four Thousand Two Hundred Fifty-one to Doe Four Thousand Five Hundred; Doe Four Thousand Five Hundred and one to Doe Four Thousand Seven Hundred and Fifty; Doe Four Thousand Seven Hundred Fifty-one to Doe Five Thousand; Doe Five Thousand and One to Five Thousand Two Hundred and Fifty; Doe Five Thousand Two Hundred and Fifty-one to Doe Five Thousand Five Hundred; Doe Five Thousand Five Hundred and One to Doe Five Thousand Seven Hundred and Fifty; Doe Five Thousand Seven Hundred and Fifty-one to Doe Six Thousand; Doe Six Thousand and One to Doe Six Thousand Two Hundred and Fifty; Doe Six Thousand Two Hundred and Fifty-one to Doe Six Thousand Five Hundred; Doe Six Thousand Five Hundred and One to Doe Seven Thousand; Doe Seven Thousand and One to Doe Seven Thousand Two Hundred and Fifty; Doe Seven Thousand Two Hundred Fifty-one

to Doe Seven Thousand Five Hundred (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually, and (each of them) as members respectively (in groups) of said last named associations; Moe One to Moe One Thousand (inclusive as to all intervening numbers as though each said Moe was severally and separately designated), individually and (each of them) as members of said last named association; Defendants. No. 520180.

ORDER TO SHOW CAUSE, AND TEMPORARY RESTRAINING ORDER

It Is Hereby Ordered that the defendants herein, and each of them, be and appear before the above entitled court in the courtroom of Department 34 thereof, on the 18th day of October 1946, at the hour of 9:30 o'clock A. M. of said day, then and there to show cause, if any they or any of them may have, why an order should not be made and entered herein by which they, and each of them, their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them, shall be enjoined and restrained and commanded to desist and refrain, pending final determination of this action, from doing or attempting to do or causing to be done, directly or indirectly, by any means, method or device whatsoever any or all of the following acts.

1. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or near plaintiff's places of business, any picket or pickets or member or members of defendant associations, or any of them, or other person or persons, for the purpose or with the intent of intimidating, threatening, molesting or coercing plaintiff or any of its present or future employees or customers or tenants or the employees of or persons intending to become employees of plaintiff's customers or tenants; or any person or persons dealing with or delivering things to or intending to deal with or deliver things to plaintiff or plaintiff's customers or tenants, or any of them.

2. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or near plaintiff's places of business, any picket or pickets or member or members of defendant association, or any of them, or other person or persons, for the purpose or with the intent of intimidating or coercing any person or persons from entering plaintiff's place of business.

3. Applying any vile names or words of ridicule, abuse or contempt or words intended, designated or calculated or apt to excite fear to plaintiff or any of such employees, customers or tenants or employees of customers or tenants or persons dealing with or delivering things to plaintiff or its customers or tenants for the purpose or with the intention of intimidation, threat, molestation or coercion.

4. Obstructing plaintiff or its employees, customers or tenants, or other persons, from ingress and egress into and out of plaintiff's places of business by walking, marching or standing in groups or in any other manner.

5. Standing, marching or walking in groups or columns before or across the ordinary places of ingress to and egress from plaintiff's places of business in such manner as not to leave between adjacent elements of such groups or columns ample space for the passage of persons or of vehicles seeking access to or from plaintiff's place of business; which space shall be not less than twenty-five feet (25′) in the case of places of ingress and egress customarily used for vehicular traffic and fifteen feet (15′) in the case of places of ingress and egress customarily used solely for pedestrian traffic.

6. Cursing at, swearing at, shouting at, yelling at or making vile, opprobrious, insulting, obscene or abusive remarks to employees, customers or tenants of plaintiff, or employees of plaintiff's customers or tenants, or other persons seeking to enter or leave plaintiff's place of business, for the purpose or with the intent of intimidating, threatening, coercing, harassing or molesting such persons or any of them.

7. Yelling or shouting in a loud or boisterous manner or making loud or unusual noises or using any devices for the megnification of sound, including devices customarily known as "loud Speakers," in the vicinity of plaintiff's place of business with the intention or for the purpose or with the effect of disturbing the peace or quiet of the neighborhood of plaintiff's place of business; or for the purpose or with the intent of intimidating, threatening, coercing, harassing or molesting persons in or upon or entering or leaving said place of business; or for the purpose or with the intent or with the effect of interfering with the conduct of the business of plaintiff or the business of plaintiff's customers or tenants, or their or any of their employees, in the production or preparation for production of motion pictures.

8. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or within two hundred (200) yards of plaintiff's places of business, or any of them, any picket or pickets.

9. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or within two hundred (200) yards of plaintiff's places of business, or any of them, any member or members of defendant associations, or any of them, or any other persons, to act as pickets, or to make known by any sign, insignia, oral or written communication or device, or in any other manner, that they are at such place as pickets or in their capacity as members of defendant associations, or any of them, or in connection with any strike against plaintiff by any of defendant associations, or in connection with any labor dispute between plaintiff and any of defendant associations.

10. Standing or marching or loitering at or in front of or within two hundred (200) yards of plaintiff's said places of business, or any of them.

Or in the alternative, if the prayers of subparagraphs 8, 9 and 10, or any of them, be denied, then in lieu thereof:

11. Stationing or placing or maintaining more than twenty-five (25) pickets or members of defendant associations or any of them, or other persons, in the aggregate

at any one time in front of or at or in the immediate vicinity of, or within two hundred (200) feet of plaintiff's place of business lying between Gower Street and Beachwood Drive, and southerly of Sunset Boulevard; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the main studio entrance at 1438 North Gower Street and the truck loading entrance immediately northerly thereof, or either of them; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the auto entrance at 1339 North Beachwood; or more than four (4) of such pickets, members or persons in front of or within twenty-five (25) feet of the pedestrian entrance to said place of business at 1401 North Beachwood; or more than two (2) of such pickets, members or persons in front of or within twenty-five (25) feet of the property room door at 1431 North Beachwood; or more than eight (8) of such pickets, members or persons in the aggregate, in front of any or all of the offices of plaintiff on the easterly side of Beachwood Drive; or more than four (4) of such pickets, members or persons in front of or within twenty-five (25) feet of the entrance to the Writers Building at 1300-1306 North Gower; or more than six (6) of such pickets, members or persons in front of or within twenty-five (25) feet of the entrance to the Columbia-Darmour Studio at 5823 Santa Monica Boulevard; or more than six (6) of such pickets, members or persons in front of or within twenty-five (25) feet of the property giving access to the drive-in gate near the corner of Santa Monica Boulevard and Van Ness Avenue; or more than eight (8) of such members, pickets or persons at or in front of or within two hundred (200) feet of the Talisman-Sunset Studio of plaintiff at 1422 Lyman Place; or more than four (4) of such pickets, members or persons at or in front of or in the vicinity of plaintiff's publicity office at 6048 Sunset Boulevard; or more than twenty-five (25) of such pickets, members or persons in the aggregate at any one time in front of or at or in the immediate vicinity of, or within two hundred (200) feet of plaintiff's ranch in the City of Burbank; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the main ranch

gate at 3701 Oak Street, Burbank; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the entrance to plaintiff's ranch on Pass Avenue, approximately 300 feet North of Oak Street; or more than eight (8) of such pickets, members or persons at any one time within fifty (50) feet of any given point in the vicinity of any of plaintiff's places of business.

It Is Further Ordered that pending the hearing of said application for preliminary injunction the defendants, and each of them, their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them, are and each of them is hereby restrained and enjoined and commanded to cease, desist and refrain from doing or attempting to do or causing to be done, directly or indirectly, by any means, method or device whatsoever, any or all of the acts described in paragraphs 1, 2, 3, 4, 5, 6, 7 and 11 hereof.

Dated this 9th day of October, 1946.

WILLIS,
Judge.

(7344)